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# Supreme Court

of the

# United States

October Term, 1978

NO. A-426

BOBBY WADE HOLLAND,

*Petitioner,*

*vs.*

SEABOARD COAST LINE RAILROAD COMPANY,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

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BOBBY WADE HOLLAND,
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SEABOARD COAST LINE
RAILROAD COMPANY,
*Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

The Petitioner, BOBBY WADE HOLLAND, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the District Court of Appeal of Florida, First District, entered in this proceeding on December 20, 1977.

## OPINION BELOW

The Opinion of the District Court of Appeal at 353 So.2d 618 (Fla. 1st DCA 1978) appears in the Appendix hereto. (A. 1-7) A timely Petition for Rehearing was denied without opinion by the District Court of Appeal of Florida, First District, on January 12, 1978. Petition for Writ of Certiorari was denied by the Supreme Court of Florida on May 17, 1978; a timely Petition for Rehearing was denied without opinion by the Supreme Court of Florida on August 28, 1978.

## JURISDICTION

The Opinion of the District Court of Appeal of Florida, First District, was entered on December 20, 1977 and a timely Petition for Rehearing was denied on January 12, 1978. Petition for Writ of Certiorari to the Supreme Court of Florida was denied on May 17, 1978; Petition for Rehearing was denied by the Supreme Court of Florida on August 28, 1978. This Court entered its Order on November 6, 1978 extending time to file the Petition for Writ of Certiorari to and including January 26, 1979. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).



## QUESTIONS PRESENTED

1. Whether a Federal right of recovery under the Federal Employers' Liability Act may be defeated by local State rules of pleading and practice that are in conflict with Federal notice pleading.

2. Whether a local harmless error statute may be applied in an action under the Federal Employers' Liability Act so as to render harmless the erroneous exclusion of a viable theory of liability from consideration by the jury.

3. Whether the exclusion of proof of a viable theory of liability in an action arising under the Federal Employers' Liability Act constitutes deprivation of right to a jury trial under the Seventh Amendment to the Constitution of the United States.

4. Whether in an action under the Federal Employers' Liability Act a jury charge on legal causation utilizing the "but for" test of proximate cause is erroneous and constitutes reversible prejudicial error.

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Seventh Amendment to the Constitution of the United States of America providing in relevant part:

> In Suits in common law . . . the right of trial by jury shall be preserved . . . .

2. Federal Employers' Liability Act, 45 U.S.C.A., Section 51, providing in part:

> Every . . . railroad . . . shall be liable in damages . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track . . . or other equipment.

3. Florida Statute, Section 59.041 (1975):

> No judgment shall be set aside or reversed, or new trial granted by any Court of the State in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the Court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This Section shall be liberally construed.



## STATEMENT OF THE CASE

### 1. Proceedings Below

The Petitioner was the Plaintiff in Duval County Circuit Court, in a personal injury action instituted pursuant to the Federal Employers Liability Act, and the Federal Safety Appliance Act. The plaintiff was a brakeman, who lost both legs in a switching movement when he fell from a rear car on the train as it was backing up to be coupled onto the remainder of the train cars. The wheels passed over his legs, resulting in amputation.

The incident occurred on the night of October 17, 1973 in Tifton, Georgia. The Petitioner alleged various acts of negligence on the part of the railroad under the Federal Employers Liability Act, and claimed various violations of the Safety Appliance Act. (A. 7-13). A jury verdict for the defendant railroad was returned and final judgment was entered. The motion of the plaintiff/Petitioner for a new trial was denied. (A. 13-19). The plaintiff appealed to the First District Court of Appeal and the judgment was affirmed. (A. 1-7) Plaintiff's Petition for a Writ of Certiorari was denied without opinion by the Supreme Court of Florida.

### 2. The Facts Shown at Trial

The Petitioner, BOBBY HOLLAND, was working as brakeman for the Respondent RAILROAD during a pre-dawn switching movement in Tifton, Georgia, on October 17, 1973. The train was headed in a southerly direction. The engine unit and the front thirteen cars uncoupled from the rest of the train and left the balance

of the train standing to the north of the sidetrack. Twenty-six cars were located on the sidetrack and were to be coupled onto the rear of the engine and thirteen cars. The entire unit would then back up and couple up with the balance of the train which had been left standing a considerable distance to the north.

The engine and thirteen cars proceeded south past the sidetrack and BOBBY HOLLAND got off the train, threw the switch, and the engine and thirteen cars backed up onto the sidetrack, coupling up with the twenty-six cars. The train then proceeded off the sidepass, onto the main track and northward, clearing the switch; and BOBBY HOLLAND threw the switch again so that the train (engine and thirty-nine cars) could proceed backward on the main track to couple up with the cars that had been left behind. Under the switching movement as performed, BOBBY HOLLAND was required to get onto a rear car to ride back to the standing cars far to the north, and would then walk the length of the train to the lead engine to board. While the train was proceeding backward, however, BOBBY HOLLAND fell from the car and the train rode over his legs, severing them.

BOBBY HOLLAND sued the railroad, ultimately alleging in his Complaint, as amended, that the accident was caused through RAILROAD negligence, in, among other things, utilizing unsafe equipment; improperly signaling HOLLAND as to the movement; utilizing defective radio equipment; utilizing defective brakes; proceeding backward and disregarding HOLLAND's signals; backing up in such a manner as to cause excessive slack; failing to property communicate with HOLLAND; "negligently failing to furnish the



plaintiff a reasonably safe place in which to work"; and "negligently instructing and/or directing the train crew to pick up cars on the pass track in a manner and method as was known by the defendant to be hazardous when there was a safer alternative method of accomplishing the same objective." (A. 7-13).

With regard to negligence in failing to furnish a reasonably safe place to work and in negligently directing the crew to pick up cars by a hazardous method, when there was a safer alternative method of accomplishing the same objective, BOBBY HOLLAND, during discovery, inquired into existence of a growth of weeds and accumulation of debris, adjacent to the main tracks, just south of the sidetrack and switch. (A. 20-29). BOBBY HOLLAND attempted to establish that the RAILROAD, in permitting the accumulations and weeds, prevented a safer alternative from being utilized; and that this was relevant to his claim of negligent failure to provide the plaintiff with a reasonably safe place to work, and in negligently instructing the hazardous method utilized when there was a safer alternative method of accomplishing the same objectives.

HOLLAND's counsel emphasized this theory during the pre-trial conference, on a discussion of HOLLAND's Motion to Produce certain matters which would demonstrate RAILROAD knowledge of the weeds and debris—and which in turn would reveal that the RAILROAD, through permitting the condition to exist to the south of the switch and sidetrack, precluded a safer alternative. Counsel advised that riding a car at night in a back-up movement was dangerous, and that if the weeds did not exist just to the south of the track, the safer method could have been utilized. (A. 20).

In short, had the weeds and debris not existed, BOBBY HOLLAND would never have had to have ridden on the back of a moving car as it backed up in the dark; he could simply have checked the coupling and walked through the area to the engine.[1]

Again, in opening statement at the trial, HOLLAND's counsel explained to the jury that a safer switching movement could have been utilized whereby BOBBY HOLLAND never would have had to ride backwards in the dark but for the accumulation of weeds and debris.

At the trial, the trial court excluded the evidence which would demonstrate existence of weeds and debris preventing the use of a safer alternative switching movement. (A. 28-35). The trial court held that this theory was an afterthought, not covered by the pleadings; was inconsistent with the pleadings; and that the weeds and debris existing south of the track was not a cause of the accident at all. The evidence was excluded and HOLLAND's Motion for New Trial was ultimately denied. (A. 13-19).

At the close of the evidence, the trial court instructed the jury improperly on legal cause in this FELA-Safety Appliance Act case, as follows:

[1]In the Appendix is a copy of the diagrams which were contained in the reply brief of Holland in the District Court of Appeal proceeding. The diagrams illustrated the move as it was made and the move as it could have been made but for the weeds and debris. The diagrams reflect Holland's theory as presented in the proffers that were rejected; as compared to the move as actually made, as the testimony reflects. (A. 36-41).



> Negligence is a legal cause of injury if it directly and in a natural and continuous sequence produces, or contributes to producing such injury so that it can reasonably be said that but for the negligence, the injury would not have occurred.

This charge was given over HOLLAND's objection.

BOBBY HOLLAND appealed to the District Court of Appeal, First District, urging that the trial court committed reversible error in rejecting the proffers which would have shown that the weeds precluded a safer method. The First District Court of Appeal held as follows with regard to the evidence on the weeds and debris:

a. The proffered evidence that the RAILROAD failed to remove high weeds and debris adjacent to the track and roadbed near the accident scene was not admissible under any pleaded theory of negligence, including allegations in HOLLAND's Amended Complaint that the RAILROAD failed to furnish a reasonably safe place in which to work and negligently directed the train crew to pick up cars by a hazardous method when there was a safer alternative method of accomplishing the same objective.

b. The proffered evidence was not admissible to prove that the RAILROAD failed to provide HOLLAND a reasonably safe place to work, because HOLLAND "did not traverse the area said to have been overgrown with weeds and strewn with debris."

c. The proffered evidence in support of HOLLAND's theory of liability — "that by permitting an accumulation of weeds and debris, the Railroad negligently foreclosed appellant's use of that area of the track which, if used, would have permitted a safer operation than the operation actually employed" — may well have been a potential theory of liability, "but in causative terms, it was a step away from the pleaded theory."

d. "The bare mention of that theory of potential liability in the pre-trial conference held a few days before trial . . . did not amend the Complaint so as to require expansion of the liability theories at trial."

e. Any error, in any event, was "harmless" in the context of the lengthy and complicated trial of numerous liability issues and numerous theories of liability, under Florida Statutes Sec. 59.041 (1975). There is no miscarriage of justice after examination of the entire record where the jury considered and rejected HOLLAND's proof that the particular method used to move the train at the time and place of his injury was unreasonably dangerous.

f. The charge on legal cause, incorporating as it did the "but for" test of proximate causation, was error in a FELA or Safety Appliance Act case but was not of "sufficient magnitude to require reversal, considering the charge as a whole;" the error was "harmless" because it was used only once during the charge. The jury was also charged on the appropriate FELA or Safety Appliance Act test — that is, causation would be established if the alleged improper act on the part of the RAILROAD "contributed in whole or in part" to HOLLAND's injury.



g. The First District further held that the prejudicial effect of the erroneous portion of the offending instruction was obliterated by a following paragraph stating that under FELA, the RAILROAD was responsible if it were negligent and the negligence played any part, however small, in producing the injury for which damages are sought.[2]

### 3. How Federal Question is Presented

This action was brought under the Federal Employers' Liability Act and Safety Appliance Act. In Petitioner's Suggestion For Certification, filed in the District Court of Appeal of Florida, First District, seeking to certify the decision to the Supreme Court of Florida for certiorari review, upon the grounds that the decision passes upon questions of great public interest, Petitioner specifically stated:

* * * * *

> Whether exclusion of proof of a viable theory of liability, in an FELA case, because of local pleading rules, constitutes deprivation of right to a jury trial under the Seventh Amendment to the Constitution of the United States?

The District Court of Appeal of Florida, First District, denied Petitioner's Suggestion For Certification.

Throughout the proceedings, the Petitioner has asserted the applicable Federal FELA case law that had heretofore been applied uniformly throughout the country to protect Petitioner's substantive rights under the Federal Employers' Liability Act.

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[2]The concurring Opinion found no error with the "but for" language of the charge, harmless or otherwise.

## REASONS FOR GRANTING THE WRIT

1.

THE DECISION BELOW DEFEATS A FEDERAL RIGHT OF RECOVERY UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT BY APPLICATION OF RESTRICTIVE LOCAL PLEADING RULES, CONFLICTING WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AS TO LIBERAL FEDERAL NOTICE PLEADING.

The decision below holds that a potential theory of liability under the FELA is properly excluded from consideration by the jury where "in causative terms it was a step away from the pleaded theories." Included among the allegations of negligence in this FELA action, BOBBY HOLLAND asserted that the RAILROAD was negligent in failing to furnish a "a reasonably safe place in which to work" and "in negligently directing the train crew to pick up cars by a hazardous method when there was a safer alternative method of accomplishing the same objective." The District Court of Appeal, First District of Florida, flatly held that the pleaded theory of negligence was insufficient to permit the introduction of evidence on the issue of the RAILROAD's negligent foreclosure of an area of the railroad track which, if used, would have permitted a safer operation than the operation actually employed; the proffered evidence simply being inadmissible under the pleadings.

This application of a stringent and restrictive pleading requirement in an FELA action, effectively defeating BOBBY HOLLAND's recognized theory of



liability, directly conflicts with the liberal notice pleading rule set forth by this Court in *Conley v. Gibson,* 355 U.S. 41, 47-48, 78 S.Ct. 99, 103 (1957). In considering the sufficiency of allegations in a complaint for declaratory relief, this Court announced:

* * * * *

> . . . . (T)he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests . . . Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pre-trial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. . . .

Accord, *Komer v. Shipley,* 154 F.2d 861 (5th Cir. 1946). Indeed, the record herein reflects that pre-trial discovery apprised the RAILROAD of HOLLAND's claim that the negligent accumulation of weeds and debris prevented utilization of a safer alternative method; in particular, at the pre-trial conference, HOLLAND's counsel discussed in depth the relevancy

of matters demonstrating the RAILROAD's knowledge of the accumulation of weeds and debris and its failure to remedy same in connection with the claims of negligence.

Under Federal cases and law, the amended pleadings were sufficient to advance the theory, recognized as a potentially viable one by the District Court of Appeal, that, as the appellate court characterized it, "the Railroad negligently foreclosed Appellant's use of that area of the track which, if used, would have permitted a safer operation than the operation actually employed." The allegations of HOLLAND's amended pleadings alleging negligence in failure to provide a reasonably safe place to work and in directing a hazardous method where there was a safer alternative method, under Federal notice pleading necessarily incorporated this theory of negligence. In this regard, the decision below conflicts with the opinion in *Bailey v. Central Vermont Ry,* 319 U.S. 350, 63 S.Ct. 1062 (1943). In reinstating the verdict for the plaintiff railroad employee that had been vacated by the Supreme Court of Vermont, this Court in *Bailey, supra,* found the evidence of the railroad's negligence in failing to provide the plaintiff with a safe place to work sufficient to support the jury verdict. Of particular significance here is the Court's finding that evidence presented to the jury of a safer alternative method of unloading the car, i.e., "the car could have been opened or unloaded near the bridge on level ground," was properly considered by the jury under the allegation of plaintiff's complaint that the railroad had failed to furnish plaintiff with "a safe place to do the work." (319 U.S. 1063-1064).



The decision below also conflicts with that of this Court in *Strickland v. Seaboard Air Line Railroad Co.,* 350 U.S. 893, 76 S.Ct. 157, (1955), where in a per curiam opinion, this Court granted the petition for writ of certiorari and reversed a judgment for the railroad, citing *Bailey v. Central Vermont Ry, supra.* In the original action before the Florida Supreme Court, *Seaboard Airline Railroad Co. v. Strickland,* 80 So.2d 914 (Fla. 1955), an action under the FELA, the plaintiff had secured a verdict. The plaintiff had been injured while changing an outside brake beam when he slipped and fell back against the switchbox while performing his work in a sitting, squatting or stooping position. Plaintiff had produced evidence that he could have changed the beam on a flat track over a pit while in a standing position rather than under the pullman car. There was evidence that it would have been safer to perform the work in the pit and that under those circumstances, the plaintiff could have had the assistance of a helper. The railroad presented evidence, though, that traditionally the work was done on a flat track and that had the pullman car been moved over a pit "it would not have been possible to get the trains out on time if they had to switch to a pit each car that they had to be worked on." (80 So.2d at 916).

In its original decision, the Supreme Court of Florida reversed a verdict and judgment for the injured plaintiff holding that proof of a safer place to work had no bearing on the issue of whether or not the method actually utilized, i.e., a flat track, constituted a reasonably safe place for the operation in question and that the evidence presented was insufficient to sustain a judgment for the plaintiff. In particular, the Supreme Court of Florida stated in its original opinion:

* * * * *

From what has been said, it is apparent that the plaintiff sought to prove the issue made by the pleadings — that is, whether the defendant was negligent in failure to provide him with a reasonably safe place to work — by showing that the footing and lighting were better in a pit, where plaintiff could have had a helper, and that it was unreasonable — and thus negligent — for defendant to require him to do the work on a flat track when a pit was available. There can be no doubt that there were sufficient 'probative facts', if believed by the jury, to show that it was easier and safer to change a brake beam in a pit rather than on a flat track. But we know of no rule of law which requires a railroad company to provide a workman with an easier and safer place to work if the one provided is, as a matter of fact, reasonably safe . . . . (80 So.2d at 917).

The United States Supreme Court reversed under the liberal interpretation of the FELA, citing *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 63 S.Ct. 1062, (1943). On remand, the Supreme Court of Florida necessarily decided, in accordance with the mandate, that the evidence was sufficient to create a jury question under the pleading alleging negligent failure to provide a safe place to work.[3]

[3]Errors with regard to attorney conduct and admissibility of other evidence resulted in reversal for a new trial (88 So.2d at 520-524); but the Florida Supreme Court was compelled to hold and did hold that a case of causative FELA negligence was made out by the proof of the safer alternative — which was not used because the railroad precluded it; it was not used because of railroad custom and because it would not have been possible to get the trains out on time if the railroad had to switch each car which had to be worked on to a pit.



The decision below also conflicts with a decision of the highest State court of Utah, recognizing that allegations of negligence in failing to furnish a safe place to work in an FELA action are sufficient to permit evidence of safer methods of work. In *Mooney v. Denver & R.G.W.R.Co.*, 257 P.2d 947 (Utah 1953), a safer method of work was precluded by the railroad's alleged negligent scattering of tools throughout a railroad car which necessitated the plaintiff working in a restricted area while releasing a flat car handbrake. Because the railroad had been negligent in permitting the tools to be scattered throughout the car, the plaintiff had very little room to stand and was unable to get directly behind the brakestaff while performing his work. The Supreme Court of Utah discussed the testimony regarding the scattered tools and concluded that a jury instruction outlining the plaintiff's claim of negligence against the railroad for failure to furnish a safe place to work was correct. The railroad challenged the instruction as "not within the pleadings or supported by the evidence." The Court rejected the railroad's argument, reasoning that testimony of the tools scattered throughout the car precluding utilization of a safer method of operation "present a jury question concerning negligence or non-negligence in failing to furnish a safe working place, — thus justifying the instruction mentioned." (257 P.2d at 949).

The decision below also conflicts with the above-cited cases regarding notice pleadings under FELA law insofar as it holds that the fact that BOBBY HOLLAND did not "traverse the area said to have been overgrown with weeds and strewn with debris" rendered the proffered evidence inadmissible under a general pleading alleging the RAILROAD negligently failed to provide a

reasonably safe place to work. *Strickland* and *Bailey, supra,* allowed proof of an unused alternative method to establish negligence in the method or area actually used. Additionally, under liberal Federal notice pleadings announced by the Court in *Conley v. Gibson, supra,* the District Court of Appeal's narrow construction of evidence that may be presented to prove "failure to provide a reasonably safe place to work" cannot be sustained.



a.

## THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT HOLDING THAT FEDERAL SUBSTANTIVE RIGHTS MAY NOT BE INFRINGED UNDER LOCAL PRACTICE — SPECIFICALLY HOLDING THAT LOCAL PLEADING REQUIREMENTS MAY NOT INFRINGE FEDERALLY CREATED RIGHTS.

In *Brown v. Western Railways of Alabama,* 338 U.S. 294, 70 S.Ct. 105 (1949), it was specifically held that local rules of practice and burdensome rules of pleading could not be utilized to defeat a right of recovery under the FELA and that the United States Supreme Court, in an FELA case, would not and could not accept as final a State Court's interpretation of allegations in a complaint asserting a right under the FELA. In FELA actions, Federal Courts interpret pleadings in the interest of uniformity of Federally created rights. The Court announced:

* * * * *

> Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by Federal laws. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. (Citations omitted) Should this Court fail to

protect federally created rights from dismissal because of over exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved . . . (338 U.S. at 298-299).

The dismissal of a complaint under the FELA by the State Courts of Missouri because of stringent pleading requirements in Missouri was reversed in *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018 (1949). The Court concluded that the allegations of the complaint stated a cause of action for negligence under the FELA pursuant to Federal law and that such a determination should not vary in accordance with differing pleading requirements under State and local laws. The Court further noted that any purported insufficiency of allegations in the complaint as to the particular type and cause of a maladjustment in the equipment would not accord with applicable Federal standards in such cases and, in any event, "the matter was at most one for permitting amendment or cure by proof." (337 U.S. at 179, F.N. 17)[4] *Accord, Arnold v. Panhandle & S.F.R. Co.*, 353 U.S. 360, 77 S.Ct. 840, (1957); *Dice v. Akron, C & Y.R. Co.*, 342 U.S. 359, 72 S.Ct. 312, (1952).

Here, BOBBY HOLLAND pled not only that the RAILROAD was negligent in failing to provide a reasonably safe place to work, but further pled that the

[4]Similarly, if indeed Holland's potential theory of liability that was excluded by the Court below "was a step away from the pleaded theories," under liberal Federal practice applicable in FELA actions, the pleadings should have been amended to conform to the proof. See, *Watson v. Canon Shoe Co.*, 165 F.2d 311 (5th Cir. 1948); *Green v. Baltimore & Ohio Railroad Co.*, 299 F.2d 837 (6th Cir. 1962).



RAILROAD negligently directed the train crew to pick up cars on the pass track in a manner and method known by the defendant to be hazardous, when there was a safer alternative method of accomplishing the same objective. The pleadings were more than sufficient under Federal law to allow the precluded proof — which the First District Court of Appeal here acknowledged might well have constituted "a potential theory of liability." BOBBY HOLLAND has been deprived of his substantive rights under the Federal Employers' Liability Act through the restrictive pleading requirements announced by the District Court of Appeal.

2.

THE DECISION BELOW SEVERELY UNDERMINES THE FORCE AND EFFECT OF THE FEDERAL EMPLOYERS' LIABILITY ACT BY HOLDING THAT AN ERRONEOUS EXCLUSION OF ONE OF THE PLAINTIFF'S THEORIES OF NEGLIGENCE IS HARMLESS ERROR, RAISING SIGNIFICANT PROBLEMS INSOFAR AS ASSURING A CORRECT AND UNIFORM APPLICATION OF THE FELA IN STATE AND FEDERAL COURTS.

The First District Court of Appeal of Florida held that the exclusion of proof of the RAILROAD's negligent preclusion of a safer operation than that actually employed, even if admissible, constituted harmless error under Florida Statute Sec. 59.041 (1975). The Opinion states:

* * * * *

> Moreover, when viewed in the context of a lengthy and complicated trial of numerous liability issues, any error in the trial court's refusal to permit exploration of yet another theory was harmless. Sec. 59.041, Florida Statutes (1975). The jury considered and rejected Appellant's proof that the particular method used to move the train at the time and place of his injury was unreasonably dangerous. We find no miscarriage of justice after examination of the entire record.



The District Court of Appeal's Opinion in this case has a far reaching impact on the issue of uniform treatment of FELA actions filed in State courts. Relying upon a State harmless error statute, the District Court of Appeal of Florida has deemed the erroneous exclusion of a potential theory of liability in an FELA action to be "harmless error", reasoning that the excluded liability testimony was "yet another theory" in a "complicated trial of numerous liability issues" where the jury had not found the particular method utilized for the switching movement to be "unreasonably dangerous."

A State harmless error statute simply should not apply in an FELA case so as to permit the exclusion of proof of a viable, independent theory of FELA liability.

The error simply cannot be harmless where a finding of an unreasonably safe place to work can arise out of proof of a safer alternative, the use of which the RAILROAD improperly foreclosed. *Strickland v. Seaboard Air Line Railroad Co.*, 350 U.S. 893, 76 S.Ct. 157, (1955). Where a jury, as here, was presented with the question of whether the method actually used was unreasonably dangerous, proof of a safer alternative method is directly relevant on the issue of negligence. The proof of an alternative method, which the RAILROAD through its own fault precluded, has a direct bearing on jury evaluation in an FELA case, — especially in light of the slight evidence of causative negligence that is required. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443 (1957).

The decision below, insofar as it holds that the exclusion of a viable theory of negligence — negligent preclusion of a safer alternative method — constitutes

harmless error under a State harmless error statute directly conflicts with the decision of the Second Circuit in *Eggert v. Norfolk & W. Ry. Co.*, 538 F.2d 509 (2d Cir. 1976). The negligent preclusion of a safer method of performing a particular railroad function was sufficient, alone, to sustain a finding of negligence since it could not be said that the negligent preclusion of the safer method "played no part at all in the injury to plaintiff and it was therefore error to prevent submission of the issue to the jury." (538 F.2d at 512). In *Eggert, supra,* the plaintiff was the fireman for the railroad and was responsible for transmitting signals from the ground crew to the engineer. The plaintiff ordinarily sat in the rear seat in the engine cab but since the front seat was defectively turned to one side and would not swivel properly, there was insufficient leg room to allow plaintiff to fit in the rear seat and he instead sat on the broken front seat. Since plaintiff was not sitting on the rear seat and the front seat did not swivel properly, it was necessary for plaintiff to get up and walk to the rear seat to look for the signal from the ground crew. While the plaintiff was moving between seats, the "slack action" caused by the momentum of the coupled cars knocked plaintiff off-balance and he fell. The Second Circuit reversed a directed verdict for the railroad since a jury could reasonably find that, as here, a properly functioning front seat would have permitted the utilization of a safer alternative method. The Court further reasoned that under the FELA, the right of the jury to pass upon the question of fault and causation must be most liberally viewed and, in that context, it could not be said — while the evidence was perhaps "slim" — that the broken seat played no part at all in the injury to plaintiff. Therefore, it was error to prevent the submission of the issue to the jury.



The conflict with *Eggert* is clear since BOBBY HOLLAND's proffered proof shows that the RAILROAD's negligent failure to eliminate the high weeds and debris precluded a safer switching movement which would have eliminated the need for BOBBY HOLLAND to ride backwards in the dark for approximately one-half mile. It was during this hazardous back-up movement that BOBBY HOLLAND fell to the ground and lost both legs. Under applicable FELA case law, a jury verdict could be sustained on the sole issue of the RAILROAD's negligent preclusion of the safer method of performing the switching movement so that the exclusion of this theory from consideration by the jury is necessarily prejudicial and the Florida harmless error statute should not be applied to defeat Holland's claim. *Accord, Mooney v. Denver & R.G.W.R. Co.*, 257 P.2d 947 (Utah 1953); *Stone v. New York, C. & St. L.R.Co.*, 344 U.S. 407, 73 S.Ct. 358 (1953); *Boston & M.R.R. v. Meech*, 156 F.2d 109 (1st Cir. 1946) cert. den. 329 U.S. 763 (1946); *Rodriquez v. Delray Connecting Rd.*, 473 F.2d 819 (6th Cir. 1973).

3.

THE EXCLUSION OF PROOF OF A VIABLE THEORY OF LIABILITY IN AN ACTION ARISING UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT, BECAUSE OF LOCAL PLEADING RULES, CONSTITUTES DEPRIVATION OF RIGHT TO A JURY TRIAL UNDER THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The decision below departs from the Rule pronounced by this Court that an injured employee's right to a trial by jury in an FELA case cannot be defeated or restricted by local rules of pleading and practice. *Brown v. Western Railway of Alabama,* 338 U.S. 294, 296, 70 S.Ct. 105, 106 (1949); *Bailey v. Central Vermont Ry.,* 319 U.S. 350, 354, 63 S.Ct. 1062, 1064 (1943); *Dice v. Akron, C. & Y.R.Co.,* 342 U.S. 359, 363, 72 S.Ct. 312 (1952).

This Court announced in *Dice, supra:*

* * * * *

> We have previously held that "the right to trial by jury is 'a basic and fundamental feature of our system of Federal jurisprudence' " and that it is "part and parcel of the remedy afforded railroad workers under the Employers Liability Act. *Bailey v. Central Vermont R.Co.,* 319 U.S. 350, 354, 87 L.Ed. 1444, 1447, 63 S.Ct. 1062. We also recognized in that case that to deprive railroad workers of the benefit of a jury trial where there is evidence to support negligence "is to take away a goodly portion of the relief which Congress has afforded them." It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere "local rule of procedure" for denial in the manner that Ohio has here used. *Brown v. Western R.Co.,* 338 U.S. 294, 94 L.Ed. 100, 70 S.Ct. 105 (342 U.S. at 363).

The decision below sanctions the elimination of a viable theory of negligence from consideration by the jury because of local pleading rules. This action constitutes a denial of BOBBY HOLLAND's right to a jury trial under the Seventh Amendment to the Constitution of the United States.

4.

## THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND COURTS OF APPEALS AS TO THE INCLUSION OF A JURY CHARGE ON LEGAL CAUSE UTILIZING THE "BUT FOR" TEST OF PROXIMATE CAUSE, IN A CASE UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

In charging upon the FELA, the trial court defined legal cause as follows:

* * * * *

> Negligence is a legal cause of injury if it directly and in a natural and continuous sequence produces, or contributes to producing such injury so that it can reasonably be said that but for the negligence, the injury would not have occurred.

The First District Court of Appeal concluded that "the instruction was incorrect, however, in charging the jury it must find that 'but for the negligence, the injury would not have occurred.' " The Court further held, however, that the charge was harmless error since throughout the remainder of the charge, the jury was appropriately instructed that it should find for the plaintiff if any improper act on the part of the RAILROAD "contributed in whole or in part" to the plaintiff's injury. According to the Court, the error was not "of sufficient magnitude to require reversal" and "we find the charge as given does not rise to the level of reversible error."



The decision below departs from decisions of this Court announcing that under the FELA, if railroad negligence played any part, however small, in the happening of the accident, the injured employee still could prevail. As this Court held in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443 (1957):

* * * * *

> Under this Statute (FELA) the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought . . . . The Statute expressly imposes liability upon the employer to pay damages for injury or death due "in whole or *in part*" to its negligence.
>
> The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The Statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses and for practical purposes, the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may

with reason make that inference. (352 U.S. at 502-503).

In *Rogers*, the United States Supreme Court flatly rejected the "but for" test that had been applied by the Missouri Court, holding that language of proximate causation (i.e., "but for") simply does not belong in an action arising under the Federal Employers' Liability Act. *Accord, Harris v. Pennsylvania R. Co.*, 361 U.S. 15, 80 S.Ct. 22 (1959).

The "but for" proximate causation instruction to the jury could not be harmless in this FELA case where, as recognized by this Court, the crucial question is "whether there was evidence that *any* employer negligence caused the harm, or more precisely, enough to justify a jury's determination that employer negligence had played *any* role in producing the harm." *Gallick v. Baltimore and Ohio Railroad Company*, 327 U.S. 108, 116, 83 S.Ct. 659, 664 (1963). The applicable standard, as expressed by the Third Circuit Court of Appeals in *Pehowic v. Erie Lackawanna Railroad Company*, 430 F.2d 697, 700 (3d Cir. 1970), in a FELA case is that all that need be shown is that there be greater than a "zero probability either of employer negligence or that any such negligence contributed to the injury of an employee", to support a finding of negligence and causation. *Accord, Eglsaer v. Scandrett*, 151 F.2d 562 (7th Cir. 1945).



## CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the District Court of Appeal of Florida, First District.

Respectfully submitted,

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January 24, 1979

# Appendix

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JULY TERM, A. D. 1977

CASE NO. DD-152

BOBBY WADE HOLLAND,
*Appellant,*

*vs.*

SEABOARD COAST LINE
RAILROAD COMPANY,
*Appellee.*

Opinion filed December 20, 1977.

ERVIN, J.

Appellant Bobby Holland brought this action under the Federal Employers' Liability Act (FELA) for grievous personal injuries suffered while an employee of the appellee Seaboard Coast Line Railroad Company. He alleged numerous acts of negligence and statutory violations that resulted in his injuries. The jury, however, found for the railroad.

Appellant was injured in a switching movement. He first contends the trial judge erred in excluding evidence that the railroad failed to remove high weeds and debris adjacent to the track and roadbed near the accident scene, and that the weeds and debris made walking

there at night dangerous. As the trial court held in its order denying a new trial, the proffered evidence was not admissible under any pleaded theory of negligence. Appellant's amended complaint, as further amended, alleged the railroad was negligent in several respects, among them in failing to furnish appellant a reasonably safe place in which to work and in negligently directing the train crew to pick up cars by a hazardous method "when there was a safer alternative method of accomplishing the same objectives."

The proffered evidence was not admissible to prove the railroad failed to provide appellant a reasonably safe place to work, because appellant did not traverse the area said to have been overgrown with weeds and strewn with debris. Appellant's argument for the admissibility of his proffered evidence is that by permitting an accumulation of weeds and debris, the railroad negligently foreclosed appellant's use of that area of the track which, if used, would have permitted a safer operation than the operation actually employed. That theory may well have been a potential theory of liability, but in causative terms it was a step away from the pleaded theories. The bare mention of that theory of potential liability in the pretrial conference held a few days before trial, during counsel's argument on the scope of proper discovery in the latter states of preparation, did not amend the complaint so as to require expansion of the liability theories at trial.

Moreover, when viewed in the context of a lengthy and complicated trial of numerous liability issues, any error in the trial court's refusal to permit exploration of yet another theory was harmless. Section 59.041, Florida Statutes (1975). The jury considered and rejected ap-



pellant's proof that the particular method used to move the train at the time and place of his injury was unreasonably dangerous. We find no miscarriage of justice after examination of the entire record.

Appellant's second point concerns the jury instruction defining negligence. The trial judge charged: "Negligence is a legal cause of injury if it directly and in a natural and continuous sequence produces, or contributes to producing such injury so that it can reasonably be said that but for the negligence the injury would not have occurred."

Since Rogers v. Missouri Pacific Railroad Company, 352 U.S. 500 (1957), the test in FELA actions for determining employer negligence is simply whether it played any part, even the slightest, in producing the injury for which damages are sought. The burden of the employee is met, and the obligation of the employer to pay damages arises when there is proof, though circumstantial, from which the jury may with reason make that inference. This reasoning was adopted by the Florida Supreme Court in Atlantic Coast Line Railroad Company v. Barrett, 101 So.2d 37 (Fla. 1958). Therefore, the above quoted instruction is correct in saying the railroad's negligence is a legal cause of injury if it *"produces* or *contributes to producing"* such injury. The instruction was incorrect, however, in charging the jury, it must find that *"but for* the negligence the injury would not have occurred."

If our appellate task ended upon determining the instruction was in part incorrect, a new trial would be mandated. However, we must also determine whether the error was of sufficient magnitude to require reversal,

considering the charge as a whole. McCalley v. Seaboard Coast Line Railroad Company, 265 So.2d 11 (Fla. 1972). *McCalley* involved an alleged violation of the Federal Safety Appliance Act, 45 USC §2, which employs the same causal test as the FELA in determining an employer's negligence. During trial the jury was repeatedly instructed that a verdict should be returned for the defendant if the alleged negligence was found not to be the proximate cause of plaintiff's injuries. The Supreme Court found the concept of proximate cause plays no part in an action under the Federal Safety Appliance Act, and further, the repeated use of the term "proximate cause", together with an erroneous instruction from a 1933 pre-*Rogers* decision, constituted reversible error.

We find the charge as given does not rise to the level of reversible error. The offending "but for" language was used only once during the extensive instructions to the jury. The trial judge throughout his charge informed the jury it should find for the plaintiff if any improper act on the part of the railroad "contributed in whole *or* in part" to the plaintiff's injury. In order to determine if any prejudice resulted to Mr. Holland, we reviewed the argument of defense counsel and found no reference to the "but for" test for determining the negligence of the railroad. Defense counsel's brief reference to causation in his argument is consistent with FELA law: "They have got to show that something is defective, something isn't working, that it played some part in the accident here."

Finally, the prejudicial effect of that portion of the offending instruction is belied by the second paragraph following it:



> "Now, under the Federal Employers' Liability Act the defendant Railroad Company is liable if the defendant, his agents, servants, or employees, acting in the scope of their agency or employment were negligent and the negligence played any part, however small, in producing the injury for which damages are sought."

The jury, after nine days of trial, concluded the railroad was guilty of no improper act making it responsible for Mr. Holland's injuries. We are sympathetic to his plight. But we are compelled to find a fair trial was conducted and a sufficient factual basis existed for the jury's verdict.

We have considered the remaining points on appeal and find no error. The judgment is

AFFIRMED.

MELVIN, J., CONCURS. SMITH, Acting Chief Judge, CONCURRING WITH OPINION.

SMITH, J., concurring:

I concur in the court's decision and in all of Judge Ervin's opinion except that part which finds error, albeit harmless error, in the trial court's adaptation of Florida's Standard Jury Instruction 5.1a to the FELA context. Charge 5.1a reads

> Negligence is a legal cause of injury if it directly and in natural and continuous sequence produces or contributes *substantially* to producing such injury, so that it can

reasonably be said that, but for the negligence, the injury would not have occurred. (Emphasis added.)

The trial court excised "substantially" from the charge given the jury at this trial, thus properly accommodating the charge to an FELA case. The trial judge might also have charged the jury, but was not requested to do so, with an appropriate revision of charge 5.1b on concurring cause:

> In order to be regarded as a legal cause of injury, negligence need not be the only cause. Negligence may be a legal cause of injury even though it operates in combination with some other cause if such other cause occurs at the same time as the negligence and if the negligence contributes [omitting *substantially*] to producing such injury.

In my view the "but for" language simply requires a causative relationship which must be demonstrated even in FELA cases. The feature that distinguishes FELA cases from others is that the causative effect of the railroad's negligence may be "slight," not "substantial," and yet be actionable. Other portions of the trial court's jury charge made that point clearly. I do not conceive that the charge was error, harmless or otherwise. See Funseth v. Great Northern Ry. Co., 399 F.2d 918 (9th Cir. 1968), cert. den., 393 U.S. 1083; Spinks v. Chevron Oil Co., 507 F.2d 216 (5th Cir. 1975) (discussing identical causative requirements under the Jones Act); 3 Devitt & Blackmar, Federal Jury Practice and Instructions §94.13 (3d ed. 1977).



The charge here did not speak in terms of "proximate cause," which the Supreme Court found offensive in Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957). Rather, it further ameliorated Florida's SJI 5.1a on "legal cause," which itself ameliorated the more stringent requirements for proof of "proximate cause."

## FIRST AMENDED COMPLAINT

THE PLAINTIFF, BOBBY WADE HOLLAND, sues the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a railroad corporation, and says:

### COUNT I

CLAIM OF PLAINTIFF AGAINST THE DEFENDANT, SEABOARD COAST LINE RAILROAD COMPANY, UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

1. At all times material hereto, the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, was a corporation having its office and principal place of business at 300 Water Street, Jacksonville, Florida, from which address it directs and controls its railroad system.

2. At all times material hereto, the Plaintiff, BOBBY WADE HOLLAND, was an employee of the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, acting in the course and scope of such employment.

3. At all times material hereto, the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, was engaged as a common carrier in interstate or foreign commerce by a railroad, which embraced and included the work and employment of the Plaintiff, and the Plaintiff was engaged in an activity that affected transportation in interstate commerce.

4. On or about October 17, 1973 at approximately 5:30 A.M., in the vicinity known as "School Bus Crossing:, Tifton, Georgia, the Plaintiff was working as a brakeman on SEABOARD COAST LINE train 305, which operates from Albany, Georgia to Waycross, Georgia, and was engaged in picking up approximately 26 cars at the Tifton pass track, during which pick-up the Plaintiff was severely injured when the Plaintiff was whipped and thrown from the last car in a group of approximately 39 cars being shoved back to join train 305 on the mainline track, and as a result the Plaintiff struck the track on or between the rails causing the wheels of approximately 21 cars of the train to run over the Plaintiff.

5. The Defendant, SEABOARD COAST LINE RAILROAD COMPANY, and/or its agents, servants or employees, were guilty of one or more of the following negligent acts or negligent omissions which caused or contributed to the cause of the Plaintiff's injuries and damages as hereinafter alleged:

(a) In negligently constructing, or operating or maintaining its said railroad cars, engines, or other equipment, or other appliances.



(b) In negligently failing to furnish the Plaintiff reasonably safe place in which to work.

(c) In negligently failing to furnish Plaintiff respectively safe cars, engines, or other equipment with which to do his work.

(d) In negligently operating the said engine shoving back the 39 cars without constant radio communication with the Plainfiff brakeman.

(e) In negligently operating the said engine with defective radio communication between the engineer and the Plaintiff brakeman.

(f) In negligently operating the said engine contrary to the Plaintiff's signals.

(g) In negligently operating the said engine in disregard of the Plaintiff's signals.

(h) In negligently operating the said engine so as to cause excessive slack action.

(i) In negligently failing to give the Plaintiff reasonable warning of a dangerous and/or unsafe condition.

(j) In negligently failing to supply and make available proper radio appliances for use by the Plaintiff.

(k) In negligently failing to maintain a proper radio communication system.

6. That as a result of the said event, the Plaintiff sustained personal injuries to his head, neck, back, shoulders, including body and extremities and injuries to his nervous system, more particularly the loss of the Plaintiff's right leg at the hip and left leg at the knee; and including permanent scarring of the shoulders; and other injuries not as yet diagnosed; said injuries and the conditions resulting therefrom are continuing in their nature, so as to cause him injury, pain and disability and that the said conditions aforesaid will reasonably be expected to continue for sometime in the future.

7. As a result of his said injuries, the Plaintiff was compelled to seek medical attention, hospitalization, surgical procedures and to incur medical expense for the treatment of his said injuries and for travel necessary to secure such medical treatment; and that in the future he will be compelled to incur similar expenses for such medical care, hospitalizations, surgical procedures, and travel.

8. As a further result of his injuries and the conditions resulting therefrom, the Plaintiff's earning capacity and working ability were impaired; and in the future he will suffer future loss of his earning capacity and his ability to work.

9. As a further result of his said injuries, the Plaintiff suffered physical handicap and disability in connection with his usual activities and recreation, and will continue so to suffer such handicap and disability into the future.



10. As a further result of his said injuries and the conditions resulting therefrom, the Plaintiff suffered great humiliation and embarrassment; great mental pain and suffering, and will continue so to suffer in the future.

WHEREFORE, the Plaintiff sues the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, and demands judgment in excess of TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500.00) with interest and the costs of this action; and demands trial by jury of all issues triable as of right by a jury.

## COUNT II

## CLAIM OF PLAINTIFF AGAINST THE SEABOARD COAST LINE RAILROAD COMPANY UNDER THE BOILER INSPECTION ACT

11. The Plaintiff adopts and incorporates each and every allegation of Paragraphs 1 through 4 above.

12. The injuries to the Plaintiff occurred as the result of a defective engine radio receiver whereby the engineer was unable to hear the Plaintiff's signals.

13. The Defendants were in violation of the Boiler Inspection Act and the Safety Appliance Act in the following respect:

(a) That the locomotive radio was defective and not serviceable for the use intended.

(b) That the locomotive brakes were defective and inadequate.

(c) That the train brakes were defective and inadequate.

(d) That the engine's radio communications system was defective.

14. The Plaintiff adopts and incorporates each and every allegation of Paragraphs 6 through 10 above.

WHEREFORE, the Plaintiff sues the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, and demands judgment in excess of TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500.00) together with interest and the costs of this action, and demands trial by jury of all issues triable as of right by a jury.

## MOTION TO AMEND AMENDED COMPLAINT

COMES NOW, the Plaintiff, by and through his undersigned attorneys, and moves this Honorable Court, pursuant to F.R.C.P. 1.190, for leave to amend his Amended Complaint previously filed herein by interlineation and to add thereto in Court I, paragraph 5 an additional allegation of negligence by subparagraph (1), thereof, all of which is in the furtherance of justice and which amendment reads as follows:

(1) In negligently instructing and/or directing the train crew to pick up cars on the pass track in a manner and method as was



known by the Defendant to be hazardous when there was a safer alternative method of accomplishing the same objectives.

## ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL

Plaintiff's motion for new trial, after being twice continued, was argued before this Court on May 27, 1976. The plaintiff has listed 28 reasons why the Court should set aside the judgment entered on the jury verdict on this case and grant a new trial. However, during the arguments on the motion, plaintiff's counsel argued basically three of these reasons, namely, Nos. 4, 7 and 21. However, the Court has considered all of the reasons set forth in plaintiff's motion and has studied the cases cited by the parties during the arguments, and after due deliberation, the plaintiff's motion for new trial is denied.

The Court feels impelled to detail its reasoning for denying a new trial.

It is undisputed that the plaintiff in this case suffered grievous injuries, and if the case were to be decided on sympathy, there is no doubt but that a new trial would be granted. But, of course, this is not the standard to be applied nor was it the standard for the jury to apply in reaching their verdict.

Reason No. 4 in plaintiff's motion states that "the verdict is contrary to the manifest weight of the evidence". However, the verdict is amply supported by the evidence in this case and the jury could easily have found that the railroad was not at fault. Reasons Nos. 9

through 24 urge as error: failure of the Court to give some of the plaintiff's requested instructions, failure of the Court to give in their entirety some of plaintiff's requested instructions, and the giving by the Court of some of defendant's requested instructions. Plaintiff alleges that defendant was liable under the Federal Employers' Liability Act, Safety Appliance Act, Boiler Inspection Act and the Power Brake Law. The instructions as given to the jury adequately and properly instructed them as to each of these statutory duties. 45 U.S.C.A. §1, et.seq.; 45 U.S.C.A. §51, et.seq.; Rogers vs. Missouri Pacific Railroad Co., 352 U.S. 500, 1 L.Ed.2d 493, 77 S.Ct. 443; Bertrand vs. Southern Pacific Co., 282 F.2d 569 (9th Cir., 1960); Idzojtic vs. Pennsylvania Railroad Co., 431 F.2d 1029 (3rd Cir., 1970); Ely vs. Reading Company, 424 F.2d 758 (3rd Cir., 1970).

Plaintiff's counsel has spent a great deal of time urging upon this Court their contention that excluding evidence concerning weeds and grass allegedly located south of the pass track switch in Tifton, Georgia was the reason that the jury returned an adverse verdict against plaintiff. No doubt this will be the primary contention on appeal. Plaintiff's counsel *now* claims that the entire thrust of their case under the FELA aspect of the case was their contention that weeds growing along the mainline south of the pass track switch between Tifton and Waycross, Georgia was the reason for the particular move which was being made at the time of the plaintiff's injury. Otherwise, they contend, it would have been made differently as the defendant knew the move which was made on the night of the plaintiff's accident was unsafe.



It is to be noted that this contention was not mentioned at all in the plaintiff's original complaint, Count I (their FELA Count), which set forth eleven specific allegations of negligence, none of which made any mention whatsoever of weeds south of the pass track switch, but rather the majority of them were allegations of negligent train handling in contributing to the cause of plaintiff's injury. The plaintiff filed a first amended complaint which again set forth eleven allegations of negligence, and again failed to mention anything about weeds south of the pass track switch.

It is perfectly clear that their primary thrust in alleging negligence dealt with train handling, negligent communications and/or a negligent communication system. Following this, the plaintiff further amended his complaint on several occasions, supplementing their allegations under their Counts dealing with Safety Appliance Act, Boiler Inspection Act and one further allegation under their FELA Count which read:

> "In negligently instructing and/or directing the train crew to pick up cars on the pass track in a manner and method as was known by the defendant to be hazardous when there was a safer alternative method of accomplishing the same objective."

Plaintiff's contention also is not supported by plaintiff's counsel's opening statement to the jury. During his opening statement he mentioned about fourteen theories of liability under the FELA, Safety Appliance Act, Boiler Inspection Act and Power Brake Law. Near the end of his opening statement and while discussing the alternative means by which the cars could have been

picked up, plaintiff's counsel mentioned weeds south of the pass track switch in a sense which virtually contradicted his earlier statement that using that area was an alternative method, as from his statement concerning weeds it appeared that it was not a reasonable alternative. Thus, from the issues as framed by the pleadings, as well as plaintiff's counsel's opening statement, it is clear to this Court that their present contention that the primary thrust of their case involved the weeds theory is an afterthought when trying to review in their minds why the jury returned an adverse verdict to them.

During the trial, the testimony was uncontradicted that the method which was being employed to pick up the cars from the pass track had been used by the defendant for over twenty-five years without *any* complaints from employees or mishaps of any kind. Further, the evidence at trial was undisputed that the track crew, of which the plaintiff was a member, used the same method on the morning of the plaintiff's accident. During arguments (held outside of the presence of the jury) concerning this point, plaintiff's counsel was unable to show that there was any connection whatsoever between any weeds or lack of weeds located south of the pass track switch and the method which was decided upon by the plaintiff's crew to pick up the cars from the pass track. It was not necessary to rule on the admissibility of the profferred testimony relating to the defendant's knowledge or lack of knowledge of any weeds south of the pass track switch during a reasonable period prior to plaintiff's accident (plaintiff proffered one or two letters which predated the accident by four or five years) as there is no question but that under the issues as framed by the pleadings and testimony at trial that evidence of



weeds or lack of weeds south of the pass track switch had absolutely no relevancy or materiality in this case.

The plaintiff was allowed to put on testimony from their expert who testified that the method being employed by the defendant at the time of plaintiff's accident was unsafe and then testified as to four alternative methods which would have been, in his opinion, reasonably safe alternative methods which should have been used. The jury was appropriately instructed to the effect that the general custom of the defendant railroad in picking up the cars did not justify or excuse negligence and that in determining whether or not the defendant failed to provide the plaintiff with a reasonably safe place to work, etc., they could consider the alternative methods. After carefully considering the pleadings, trial testimony and the law, it is clear that the plaintiff's attempt to put in evidence concerning weeds which had nothing to do with the plaintiff's accident was properly excluded. Black vs. Penn Central Co., 507 F.2d 269 (6th Cir., 1974); Smith vs. Illinois Central R. R. Co., 486 F.2d 943 (5th Cir., 1974); Dobson vs. Grand Truck Western Railroad Co., 248 F.2d 545 (7th Cir., 1957); Atlantic Coastline Railroad Co. vs. Darden, 216 F.2d 125 (5th Cir., 1954); Mensen vs. Baltimore and Ohio Railroad Co., 250 N.E.2d 303.

During the oral arguments on their motion for new trial, plaintiff cited several cases in support of their contention that the evidence concerning the weeds or lack thereof should have been admitted at the trial, and I have read those cases and feel that they are clearly not applicable to this case. Cereste vs. New York, New Haven and Hartford R. Co., 231 F.2d 50 (2nd Cir., 1956), involved an employee who tripped over a lump of coal

between a set of tracks, which is a situation almost completely opposite of that involved in this case, wherein the plaintiff was riding a boxcar from which he fell. Another case cited by the plaintiff during oral argument was Chicago, B. & O. R. Co. vs. Kelley, 74 F.2d 80 (8th Cir., 1934), which involved weeds that had accumulated on tracks which then caused a braking locomotive to slide further than normal into a cut of cars. The only similarity between that case and this case is the word "weed" as it is clear that in that case the weeds had something to do with causing or contributing to the accident, whereas in this case there was no connection between the plaintiff's accident and any alleged weeds south of the pass track.

The jury was told at the outset of the case that it was expected that the entire trial would last approximately three or four days. Actually, the plaintiff's case lasted seven full days with the liability phase of their case consisting of putting on testimony concerning switching operations, braking systems (including very detailed and technical evidence of engine and train brake systems), radio systems (including very technical aspects of radio sensitivities, gain, etc.) and the details of the movements being made at the time of plaintiff's accident. As the plaintiff's case wore on, it was obvious that the jury of six women was becoming inattentive and bored and I informed both counsel of this observation on several occasions. It was obvious that the length of time in which it took the plaintiff to present his case and the type of testimony presented was completely boring to the jury. On the other hand, the defendant's case was presented clearly, concisely and briefly and was listened to most attentively by the jury.



While there were numerous factual issued to be resolved by the jury, perhaps the two most important were: (1) Whether or not the engine and cars were handled in a negligent manner and thus produced unusual and severe slack action, or whether they were handled reasonably and produced normal slack action, if any; and (2) Whether or not the plaintiff was riding the side of the leading boxcar, as he testified, or whether he was riding the end of the leading boxcar at the time of his accident.

After deliberating for approximately three hours, the jury returned their verdict resolving the factual issues in favor of the defendant and against the plaintiff.

I find no basis to disturb the jury verdict in this case.

It is therefore

ADJUDGED that plaintiff's motion for new trial be, and the same, is hereby, denied.

DONE AND ORDERED at Jacksonville, Florida, this 29th day of July, 1976.

/s/ Marion W. Gooding
CIRCUIT JUDGE

## EXCERPT FROM PRETRIAL CONFERENCE

MR. HASTINGS: Your Honor, so you understand what we are talking about, because this is a factual situation, what it is in essence in this particular area where this movement is taking place, there are high weeds, we are alleging, and there is a lot of debris. As a result of these extremely high weeds and debris, they had to do the movement not the way we feel it should have been done and we will produce evidence to say it shouldn't have been done because I say if you try to do it in this area where weeds are, you are bound to fall or trip. It is dangerous at night and an accident can happen. In any event, it is because of these weeds, that is one of the causal factors of this accident. We want to prove this is so through these particular communications we are talking about. Not only is this a dangerous condition that existed there and caused that particular movement to be necessary, but the railroad was warned not once but told many times that these weeds were high. There is debris. They were told many times and the railroad has correspondence from the working people to the effect that this condition is intolerably bad and this should be cleared up or a different movement should be made.

## DEPOSITION OF ROGER BANKS

Q All right. Are you familiar with the area south of the south pass — south switch of the south pass track at Tifton as the same was in October, or on October 17th of 1973, specifically on October 17th?

A Yes, sir, I am. I was there.



Q Can you describe that area on the main line just south of the south pass track?

A South of the south pass switch? Is that right?

Q Yes.

A Pretty well grown up, had some tie butts laying on the right of way, weeds were approximately, I guess, about waist high.

Q All right. Were the weeds thick?

A Yes, sir, they were pretty thick.

Q Did that affect the manner in which the pickup of cars off that pass truck was conducted by your crew at that time?

A Well, yes, sir, they would try to cut off to where they didn't have to walk through all of that. They tried to cut off far enough back to where they could make the pickup and then walk down the pass track.

Q Is that what requires a man to ride a car on this movement, picking up cars off that pass track?

A That and the fact that you have that School Bus Road crossing there. You have to leave that open at certain times in the morning. And that requires him to ride back to a make a coupling there and inspect the brakes as he comes back forward.

Q In discussing with Mr. Taylor, that you described earlier, the conditions there around Tifton, did you ever discuss with him the ground conditions and overlying weed conditions and debris conditions?

MR. MELTON: I will have to object to the vagueness of the question.

You can answer, Mr. Davis, if you understand it.

THE WITNESS: I understand the question, and I'm not in a position to state now whether I did or didn't, because this is a problem that we are faced with over almost 10,000 miles of railroad.

And the basic fact is that the American public is just not willing to pay for us to maintain a 100-percent control of weeds over our system.

BY MR. KIKER:

Q Would this have been a business decision again relating to cost factors on upkeep of the maintenance of way?

A Well, there again, those decisions are made on a much higher level than I have yet achieved in this company. But the primary focus or the primary — let me say the item that in my view would get the first priority would be the actual maintenance of the track itself, for therein lies the greatest danger to the employees, to the equipment and to the traveling public.



And it's simply a question of economics, of how much money you have to spend.

Q Wouldn't you also be concerned with areas where the men were required to walk, specifically with respect to the weeds and grass and debris that are in those areas where the men have to walk day in and day out?

A Yes. We give some consideration to that, too. We certainly do. We operate a — basically a weedspraying outfit over the entire system every year, to my knowledge, spraying weeds along our entire right of way. We have numerous mowing machines that are engaged in mowing our right of way.

Q Do you also have men who clean up debris?

A Basically our section forces do that on a regular basis. Now, I am not saying we pick up everything, everywhere, every day.

Q You just want to clean up the major things that the forces would see or be instructed to clean up?

MR. MILTON: Let me again object. I think, again, this is out of Mr. Davis' area completely. I don't think he is competent to be questioned along this line.

But you can give an answer, Mr. Davis, if you feel like you have an answer.

THE WITNESS: Well, your question is — appears to me to be general in nature. But we certainly around our major terminals are constantly faced with the

problem of picking up pulpwood and other debris. And we do this on a regular basis. It's not as frequent as we would like to do, probably. But there again, economics is a factor in how much we are able to do.

And we certainly attempt to mow around our road crossing and our sidings and give them more attention than we do areas where normally there's not too much activity.

BY MR. KIKER:

Q Wouldn't you consider crossties lying out beside the track where the men have to walk a major item which would need to be cleaned up and policed regularly?

A There again, this depends on the location of the crosstie, how close it is to the track, and this and that and the other. We frequently place crossties along the track when we are starting up a program of tie renewal.

**DEPOSITION OF WILLIAM HUCKEBA**

Q And I assume, as far as the condition of weeds, that this is a matter that you have to keep up with on a regular basis?

A They will grow back.

Q And I suppose you got a lot of complaints over the years about the weeds and —

A Yes, sir, weeds will grow, and it requires a lot of work to keep them —



Q Cut down?

A — cut down and under control.

Q And when you would receive such complaints, you would handle them in the manner I think you explained before, that they were referred to the —

A We did something about it just as quickly as we could.

Q Did you have some type of a program within your supervisory personnel there to check these conditions along the railroad?

A Oh, yes, trainmasters, road foremen, roadmasters, division engineer, myself, in covering the railroad would check those conditions.

Q And if you found something that looked to be dangerous or something like that, what was your procedure?

A If we found a condition that appeared to need attention, we set about having the matter taken care of as quickly as possible.

Q How often would you make these inspections?

A Oh, a roadmaster would cover his territory weekly, or more frequently sometimes. A division engineer, every week or two. Of course, the trainmaster and road foreman, they would make frequent trips. I couldn't say to the day.

Q If they saw some kind of condition, they would come back and either report it to your office or have it handled in some type of manner; is that correct?

A Yes, that's correct.

Q And I assume these individuals would be riding the area that Train 305 covered from Albany to Tifton to Waycross and be aware of conditions along that route?

A Yes.

DEPOSITION OF EARLE WILLIAMS

Q Had this type of movement ever been discussed with representatives of the union and either yourself or Mr. Huckeba in regard to alternate methods?

A You are speaking, sir, of alternate methods of picking up from the siding at Tifton?

Q Yes.

A To the best of my knowledge, it was never discussed, brought up or considered.

Q Let me ask you this, Mr. Williams: Had anyone, either in writing or to you verbally, complained or mentioned the tall weeds that were present at the pass track and also the debris and, I believe, some tie butts and what have you there?



DEPOSITION OF JAMES SHERROD

Q Were you ever made aware of any complaints in regard to the weeds in the area of the Tifton pass track prior to the day of the accident here?

A In that particular area?

Q Yes.

A No, sir.

Q Have you ever been made aware of any complaints in regard to the use of radios and outside interference on the radios?

A No.

Q Do you ever get involved with your book of rules and the violations of various rules or the implementation of new rules?

A Are you speaking of operating rules —

Q Yes.

A — or safety rules?

exactly — I can't pinpoint the area that I looked at. I looked at the area in general there.

Q I see.

A I could possibly have looked at this area.

Q Do you know if there were any tall weeds in the area east of the main line and just south of the switch of the pass track?

A I can't remember, sir, if there was or not.

Q You don't know then whether there were any weeds there or not?

A That's correct, I don't know.

Q And the same would be true of the west side of the track; is that correct?

A That's correct, yes, sir.

PROFFER [ZADNICHICK]

BY MR. FEHNER:

Q Mr. Zadnichick, assuming that there were a large number of weeds in this area south of the pass track, and there were cut tie butts, for some considerable distance down to the south of the switch, and that, on the other side of the track there was a deep ravine dropped off the side of the track.

Now, what effect would this have on any of your movements here that required walking?

A They'd certainly be an impediment on the movement of walking.

Q Let's assume these were chest-high where it was almost impossible for a person to walk?



A Well, I wouldn't consider that a safe condition to walk under those circumstances.

Q And would it in any way affect the efficiency and safety of the movement?

A Yes.

Q If those weeks began just shortly south of this switch area, shortly south several hundred feet, would that have any more effect on the movement?

A You say they did not exist until you reached a distance some several hundred feet south of the switch?

Q No, more than that, possibly less of the switch.

A The conditions you described in a very unsatisfactory working condition, whatever the location may be.

Q What effect would that have on train handling movement in that area?

A Well, certainly it would impede the efficiency, it is not a satisfactory walking condition.

Q What about at nighttime?

A It is a hazard that is increased.

BY MR. HASTINGS:

Q Sir, I'm — is there anything — to cut down to the area where you make your cut and switch is, so that they won't have to make this 35-car ride or so down to the school bus crossing, is there anything about that area, rather than cut off at the switch, you know, to clear the switch with standing cars they cut off — why they cut off way down at that street crossing? That is, do — I am talking about in the area, weeds or anything like that?

A In other words, you are asking me why did we stop back like this?

Q That's right.

A To do our work?

Q Yes.

A South of this switch about four car lengths, three or four, the shoulders of the railroad narrows up to a standard roadbed, standard — according to this type railroad. And, there is some — it is growth down there, type grass that grows real fast, prolific, it's that Sudan grass, type of Sudan grass like.

Q Grow about waist high and thick and heavy?



A It will get up above your knees, would get waist high, yes, sometimes, but normally about a little above your knees, around your knees.

Q And from there down to the next switch is about 40 or 50 cars, I believe you stated?

A Something in the neighborhood of that, yes, sir.

Q And that is the reason you cut off back there so that people will have a clean place to walk?

A (Nods.)

Q All right, sir.

A Yes, sir.

Q Now, this grass is on both sides of the track?

A Same thing on both sides, grass.

Q Yes, sir. And is that area lighted at night?

A Well, there is a little light that comes across from these lights I was talking about, I could see across through the engine, but it wouldn't help in walking purposes.

Q And is there a lot of scrap there or metal in that area, scrap yard?

A There is a scrap yard there and we do get scrap around out of the cars and occasionally you will see a piece of scrap, you know, on the ground along there.

Q And in — in your opinion with what you have described there, would you feel that it's an unsafe place to walk?

A Well, that gets back to terminology. If a man wanted to take his time and walk carefully, it would be a safe place to walk. But, a man walking and trying to check brakes, I would have to say that it would be a hazardous walking.

Q Particularly at night, I would imagine?

A That is what I am talking about, night.

Q All right, sir. And, sir, have you personally ever requested the company to clean up that walkway so that a movement could be made without having to have a man hang on the side such as Mr. Holland?

A Yes. Yes. I — I once represented the firemen on the organization and on this district and I had an access to the superintendent on other — lots of other businesses, and the brakemen would ask me to speak to the superintendent and see if we couldn't get the grass cut down there, which I did on numerous occasions.

Q And, sir, was this in a — up to an area of the time of this accident we are talking about, this is 1973 October area?

A You mean had I spoken to the superintendent previous?

Q No. Was this condition existing in October, 1973?



A In October, '73 they had came there that year and cut the weeds with the lawnmower there that year and cut the weeds with the lawnmower — I mean, a mowing machine which cuts them about four or five inches above the ground. But, that being that warm, real warm under there, had gotten back up about something like this.

Q About this, you are referring to how many —

A About 14, 16 inches.

Q 14 to 16 inches?

A Yes, sir.

Q All right, sir.

MR. HASTINGS: I think that is all. Thank you. That is the proffer.

MR. MILTON: I have a few more questions on redirect —

THE COURT: Surely.

MR. MILTON: I am sorry, on the proffer itself you want me to ask?

THE COURT: I think you better straighten it out for the record, this may go to appellate court, they may think this occurred right at the place of the accident.

CROSS EXAMINATION (ON PROFFER)

BY MR. MILTON:

Q Mr. Thompson, is the area that you have just been asked questions about by Mr. Hastings, is this anywhere in the area where your move was progressing at the time of Mr. Holland's accident?

A No, sir. This area I discussed with Mr. Hastings just previous to this was in the area south of the engine after the coupling was made.

Q In other words, it would be considerably south of, say, school bus crossing or the south pass track itself?

A Approximately three to four cars past the south pass track switch, is where it starts.

Q And the walking area from the school bus crossing to the south pass track is a good clean walking area?

A That's right.

MR. MILTON: That is all I have.

MR. HASTINGS: One last question, I apologize.

REDIRECT EXAMINATION (ON PROFFER)

BY MR. HASTINGS:

Q So, sir, if you didn't pull out, for example, with your 39 cars here going forward, before you started shov-



ing back, and if a man had to walk to the head end, he would have to be walking through this region that we have described that is south of the —

A Had I left my —

Q Switch.

A Had I left the train at the — in the vicinity of the derailer you are talking about, and pulled the train down in the clear?

Q Right.

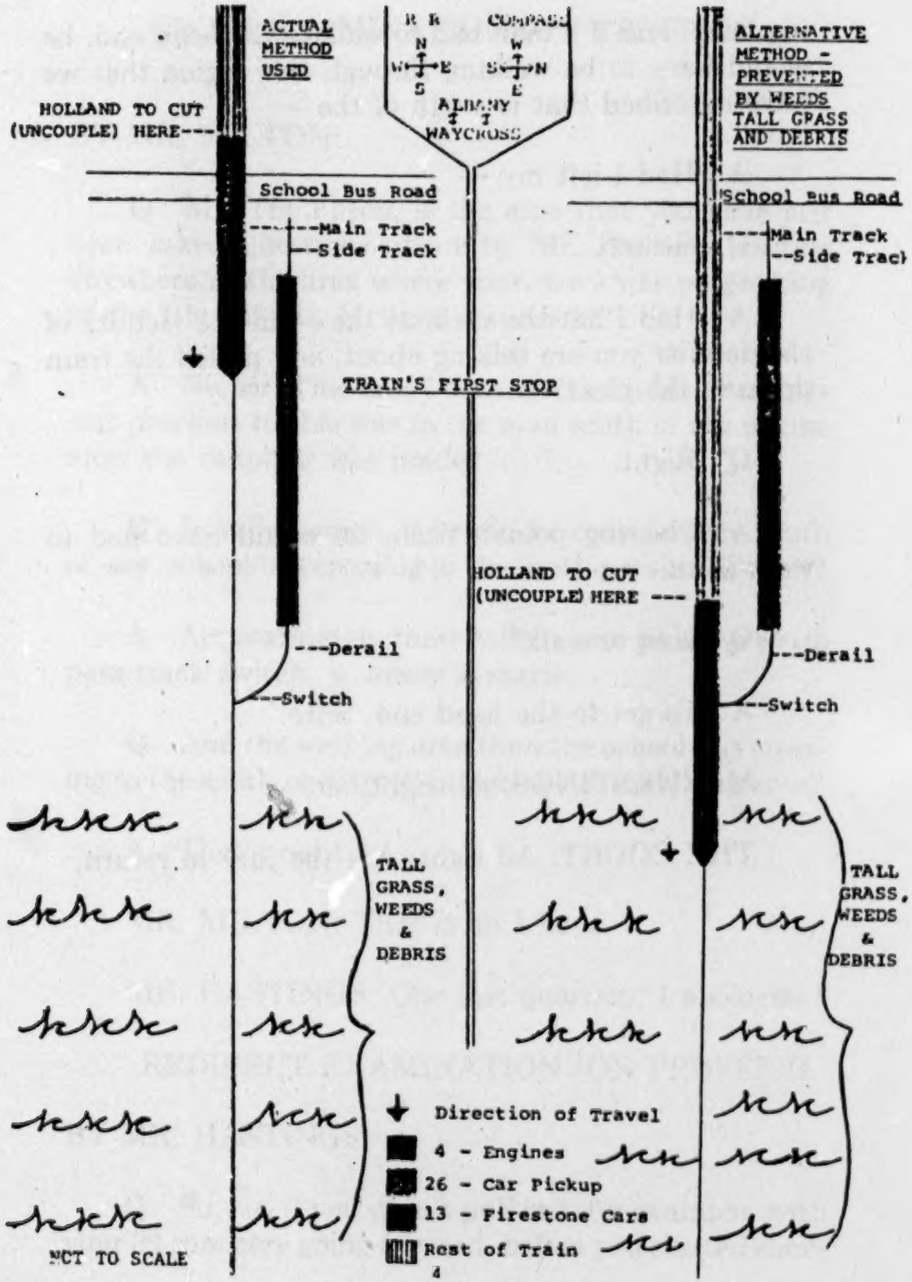
A Clearing point? Yeah, he would have had to walk in this area.

Q Had to walk?

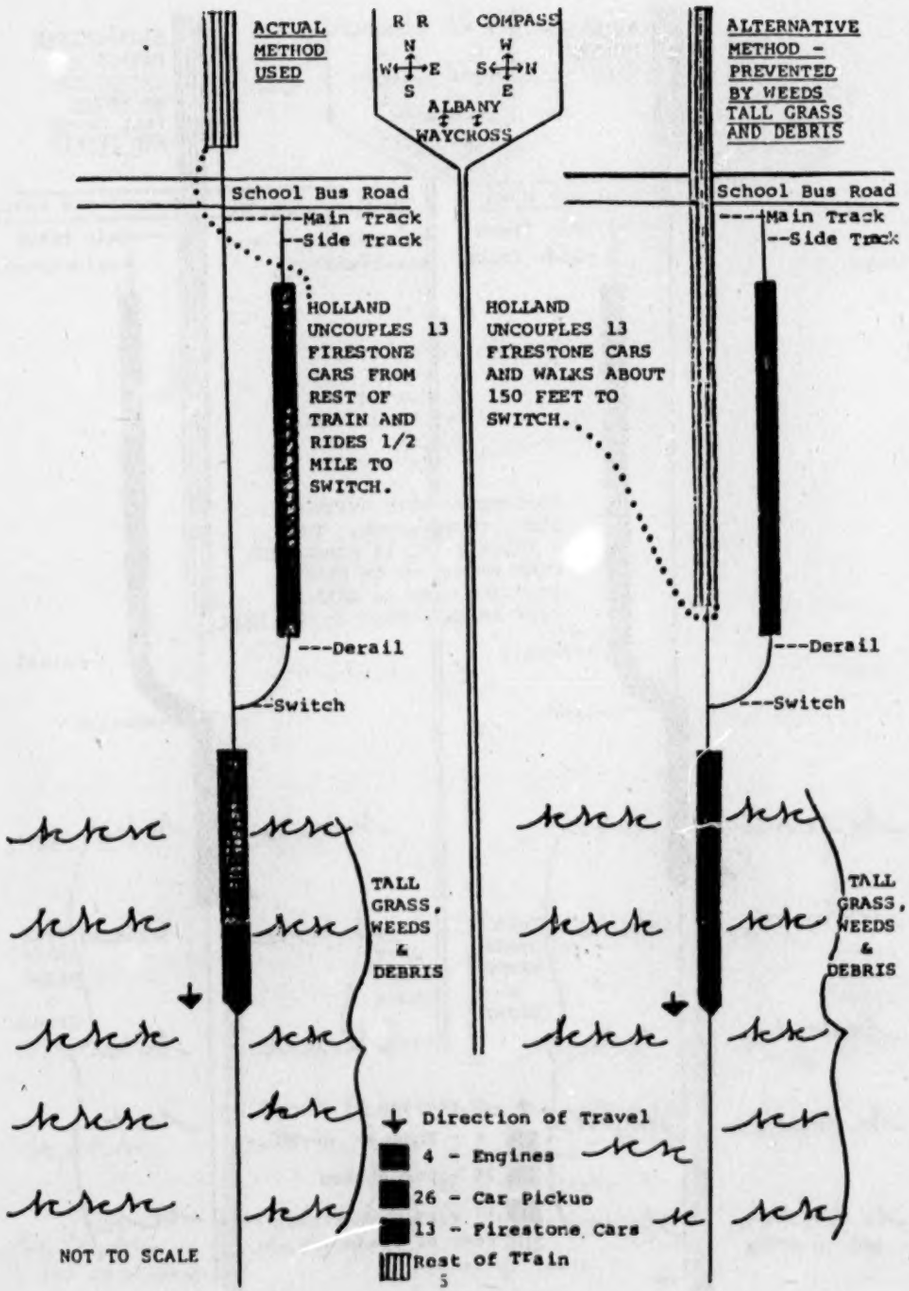
A To get to the head end. Sure.

MR. HASTINGS: All right, sir.

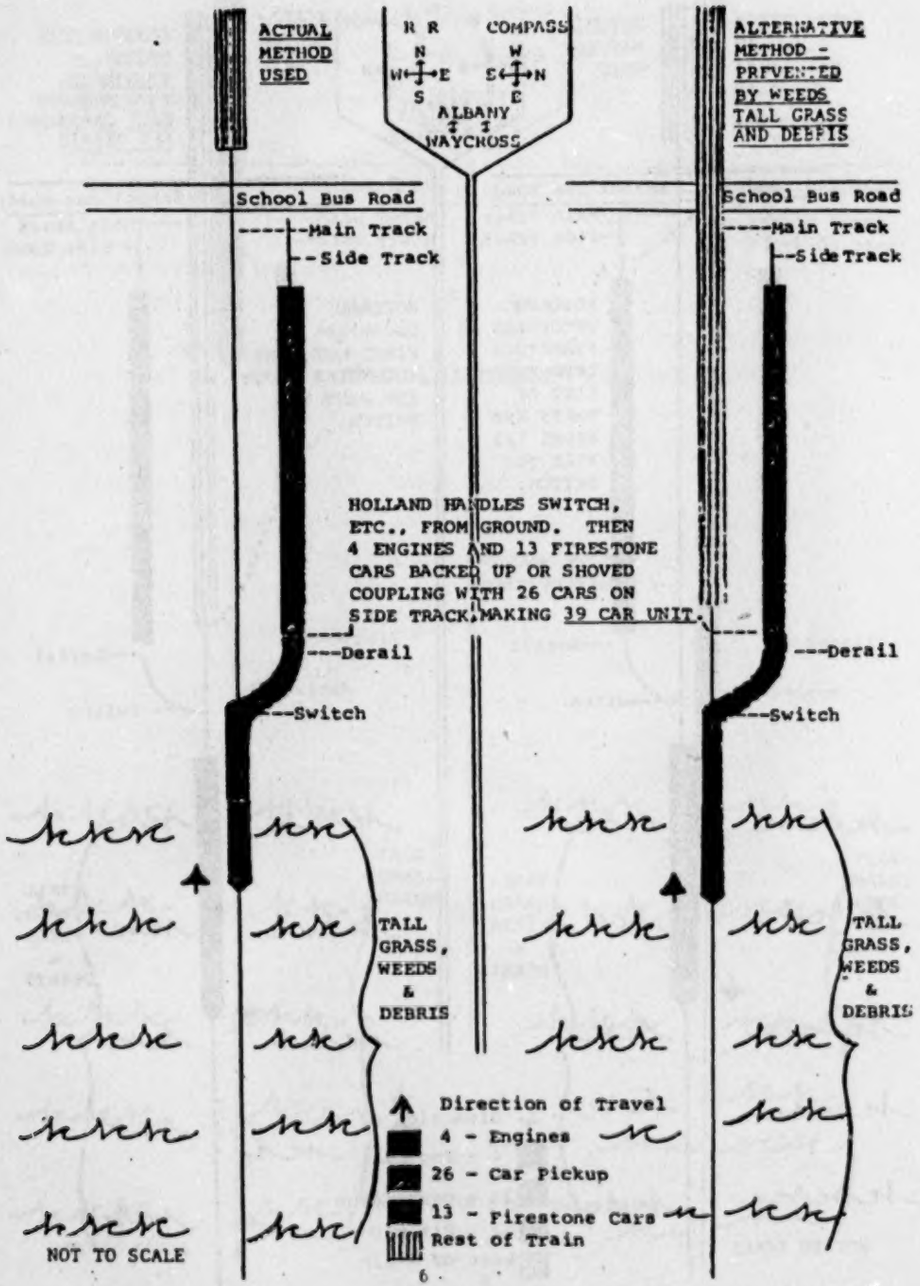
THE COURT: All right. Ask the jury to return.


ACTUAL METHOD USED
R R COMPASS
N W
W E S N
S E
ALBANY
WAYCROSS
ALTERNATIVE METHOD - PREVENTED BY WEEDS TALL GRASS AND DEBRIS
HOLLAND TO CUT (UNCOUPLE) HERE---
School Bus Road
Main Track
Side Track
TRAIN'S FIRST STOP
HOLLAND TO CUT (UNCOUPLE) HERE ---
Derail
Switch
TALL GRASS, WEEDS & DEBRIS
Direction of Travel
4 - Engines
26 - Car Pickup
13 - Firestone Cars
Rest of Train
NOT TO SCALE

App. 36

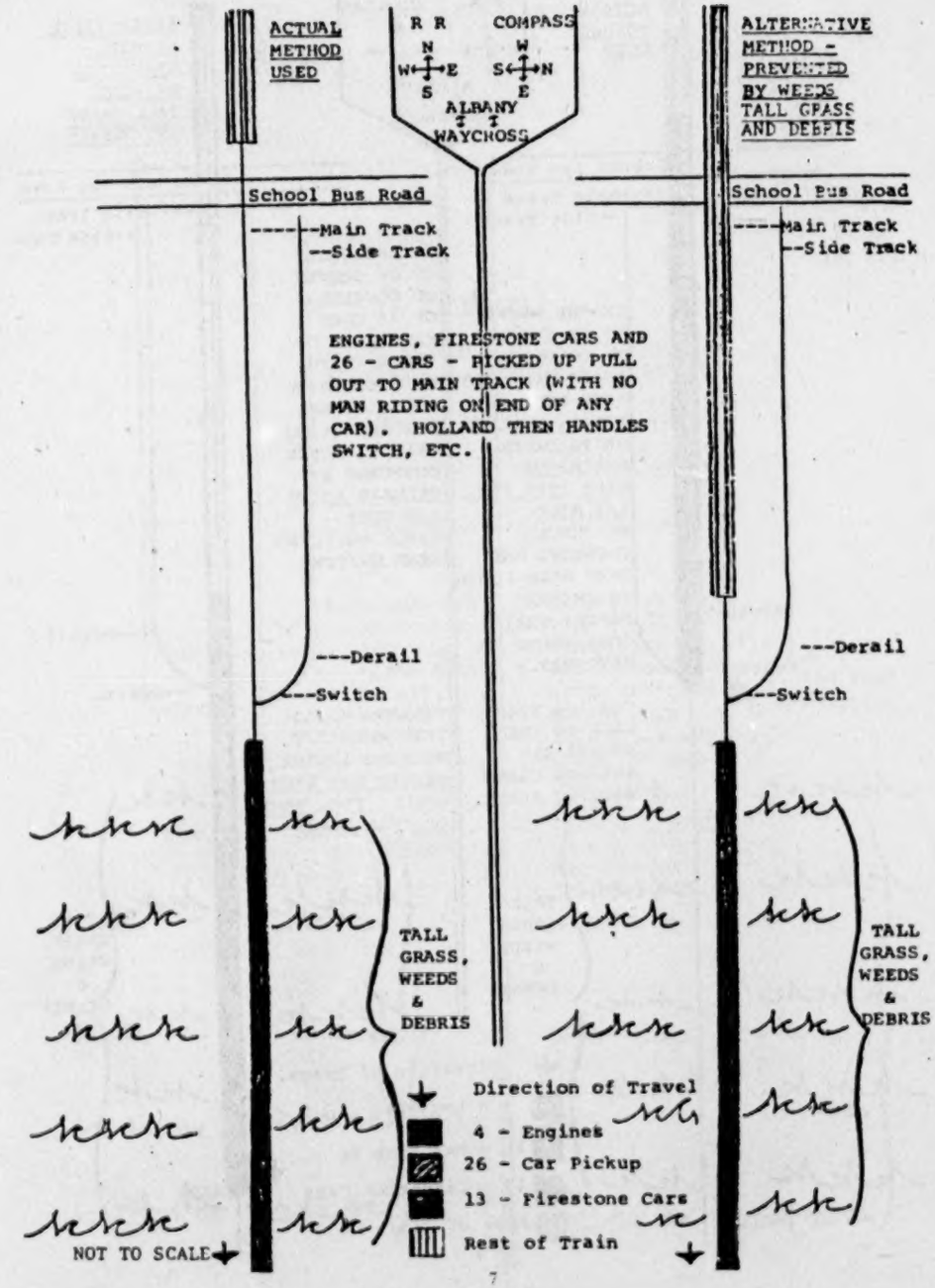

ACTUAL METHOD USED
R R COMPASS
N W
W E S N
S E
ALBANY
WAYCROSS
ALTERNATIVE METHOD - PREVENTED BY WEEDS TALL GRASS AND DEBRIS
School Bus Road
Main Track
Side Track
HOLLAND UNCOUPLES 13 FIRESTONE CARS FROM REST OF TRAIN AND RIDES 1/2 MILE TO SWITCH.
HOLLAND UNCOUPLES 13 FIRESTONE CARS AND WALKS ABOUT 150 FEET TO SWITCH.
Derail
Switch
TALL GRASS, WEEDS & DEBRIS
Direction of Travel
4 - Engines
26 - Car Pickup
13 - Firestone Cars
Rest of Train
NOT TO SCALE

App. 37


ACTUAL METHOD USED
R R
COMPASS
N
W
E
S
S
N
E
ALBANY
WAYCROSS
ALTERNATIVE METHOD - PREVENTED BY WEEDS TALL GRASS AND DEBRIS
School Bus Road
Main Track
Side Track
HOLLAND HANDLES SWITCH, ETC., FROM GROUND. THEN 4 ENGINES AND 13 FIRESTONE CARS BACKED UP OR SHOVED COUPLING WITH 26 CARS ON SIDE TRACK, MAKING 39 CAR UNIT.
Derail
Switch
TALL GRASS, WEEDS & DEBRIS
Direction of Travel
4 - Engines
26 - Car Pickup
13 - Firestone Cars
Rest of Train
NOT TO SCALE



App. 38


ACTUAL METHOD USED
R R
COMPASS
N
W
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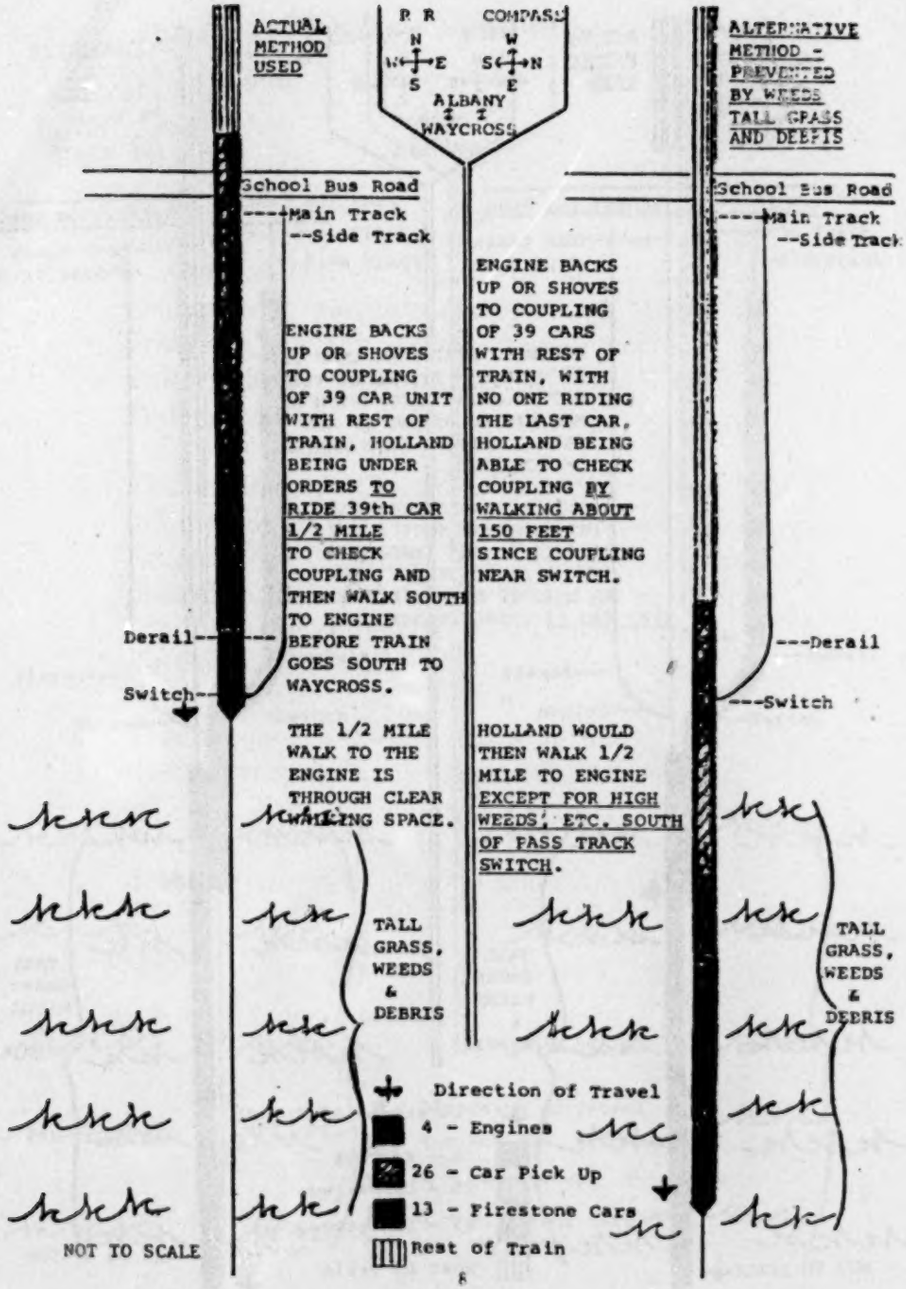
N
E
ALBANY
WAYCROSS
ALTERNATIVE METHOD - PREVENTED BY WEEDS TALL GRASS AND DEBRIS
School Bus Road
Main Track
Side Track
ENGINES, FIRESTONE CARS AND 26 - CARS - PICKED UP PULL OUT TO MAIN TRACK (WITH NO MAN RIDING ON END OF ANY CAR). HOLLAND THEN HANDLES SWITCH, ETC.
Derail
Switch
TALL GRASS, WEEDS & DEBRIS
Direction of Travel
4 - Engines
26 - Car Pickup
13 - Firestone Cars
Rest of Train
NOT TO SCALE



App. 39


ACTUAL METHOD USED
R R
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W
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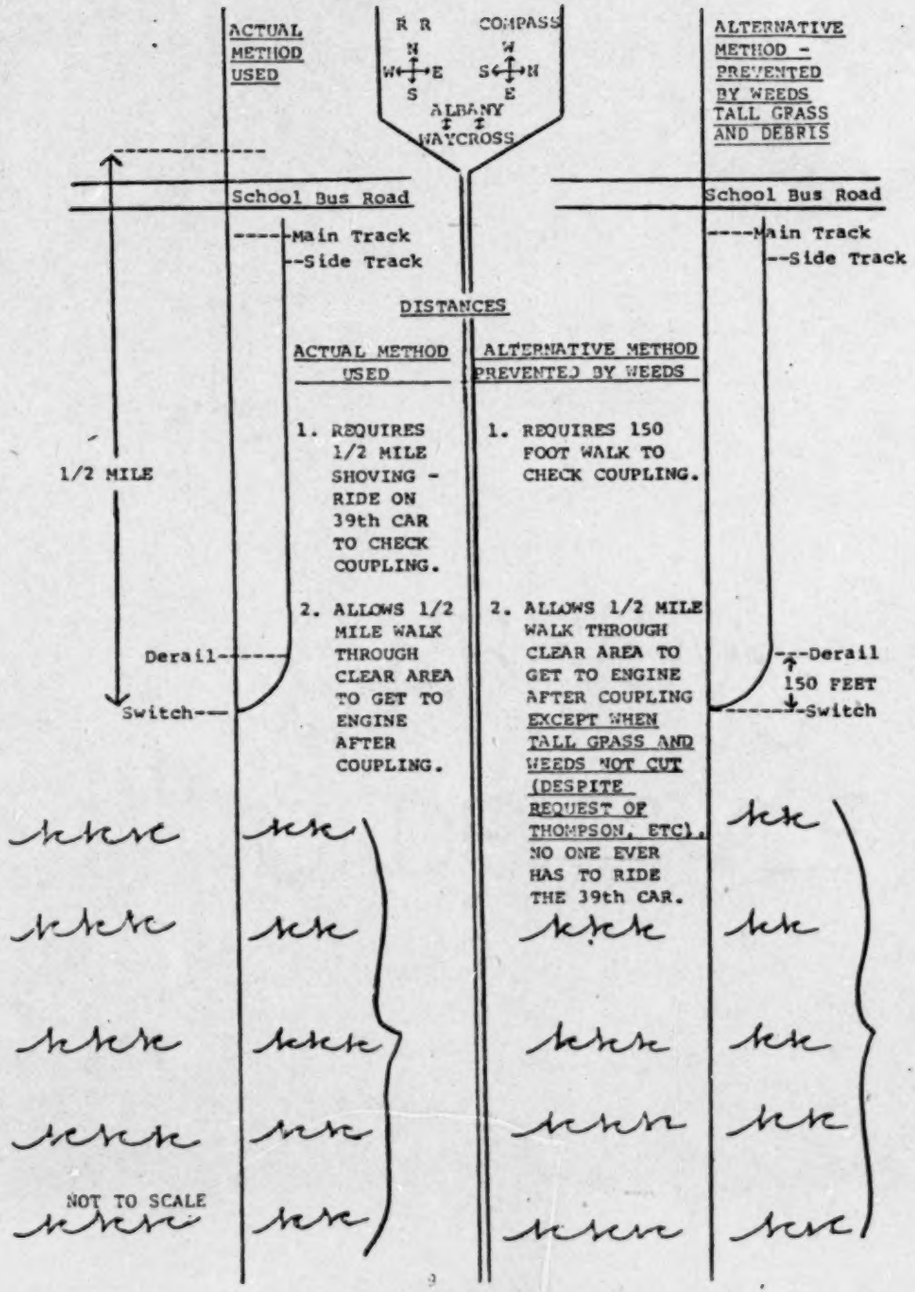
S
COMPASS
W
S
N
E
ALBANY
WAYCROSS
ALTERNATIVE METHOD - PREVENTED BY WEEDS TALL GRASS AND DEBRIS
School Bus Road
Main Track
Side Track
ENGINE BACKS UP OR SHOVES TO COUPLING OF 39 CAR UNIT WITH REST OF TRAIN, HOLLAND BEING UNDER ORDERS TO RIDE 39th CAR 1/2 MILE TO CHECK COUPLING AND THEN WALK SOUTH TO ENGINE BEFORE TRAIN GOES SOUTH TO WAYCROSS.
ENGINE BACKS UP OR SHOVES TO COUPLING OF 39 CARS WITH REST OF TRAIN, WITH NO ONE RIDING THE LAST CAR, HOLLAND BEING ABLE TO CHECK COUPLING BY WALKING ABOUT 150 FEET SINCE COUPLING NEAR SWITCH.
Derail
Switch
THE 1/2 MILE WALK TO THE ENGINE IS THROUGH CLEAR WALKING SPACE.
HOLLAND WOULD THEN WALK 1/2 MILE TO ENGINE EXCEPT FOR HIGH WEEDS, ETC. SOUTH OF PASS TRACK SWITCH.
TALL GRASS, WEEDS & DEBRIS
Direction of Travel
4 - Engines
26 - Car Pick Up
13 - Firestone Cars
Rest of Train
NOT TO SCALE

App. 40


ACTUAL METHOD USED
R R
N
W
E
S
COMPASS
W
S
N
E
ALBANY
WAYCROSS
ALTERNATIVE METHOD - PREVENTED BY WEEDS TALL GRASS AND DEBRIS
School Bus Road
Main Track
Side Track
DISTANCES
ACTUAL METHOD USED
ALTERNATIVE METHOD PREVENTED BY WEEDS
1/2 MILE
1. REQUIRES 1/2 MILE SHOVING - RIDE ON 39th CAR TO CHECK COUPLING.
2. ALLOWS 1/2 MILE WALK THROUGH CLEAR AREA TO GET TO ENGINE AFTER COUPLING.
1. REQUIRES 150 FOOT WALK TO CHECK COUPLING.
2. ALLOWS 1/2 MILE WALK THROUGH CLEAR AREA TO GET TO ENGINE AFTER COUPLING EXCEPT WHEN TALL GRASS AND WEEDS NOT CUT (DESPITE REQUEST OF THOMPSON, ETC), NO ONE EVER HAS TO RIDE THE 39th CAR.
Derail
Switch
150 FEET
NOT TO SCALE

App. 41